D.P.U. 91-DS-33

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40 by Methuen Construction Company, Methuen, Massachusetts.

APPEARANCES: Robert Smallcomb, Director

Gail Soares, Investigator Department of Public Utilities

100 Cambridge Street

Boston, Massachusetts 02202

FOR: THE PIPELINE SAFETY AND ENGINEERING

DIVISION

Thomas Tamborini, Human Resources Manager Joseph Zenga, Foreman Methuen Construction Company 100 Lindbergh Avenue Methuen, Massachusetts Respondent

I. <u>INTRODUCTION</u>

On July 3, 1991, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Methuen Construction Company ("Respondent") alleging that the Respondent violated G.L. c. 82, § 40 ("Dig-Safe Law"), by failing to exercise reasonable precautions in performing excavations at: (1) Chilcott and Washington Streets, West Roxbury, on May 30, 1991 (9:30 a.m.); (2) Chilcott and Washington Streets, West Roxbury, Massachusetts, on May 30, 1991 (2:00 p.m.); (3) Atherton Place at Columbus Avenue, West Roxbury, on June 7, 1991; and (4) Washington and Cobden Streets, Roxbury, Massachusetts, on June 10, 1991. The excavations resulted in damage to underground facilities owned by Boston Edison Company ("Boston Edison").

The NOPV informed the Respondent of its right to appear before a Division hearing officer in an informal conference to be held on August 6, 1991 at the Department's offices. The NOPV also stated that, in the alternative, the Respondent could submit a written reply by August 6, 1991.

The Respondent appeared at the informal hearing and denied that it had violated the Dig-Safe Law. The Division issued an informal decision on September 10, 1991 finding that the Respondent violated the Dig-Safe Law on three of the four occasions. In the decision, the Division informed the Respondent of its right to request an adjudicatory hearing before the Department. The Respondent was dissatisfied with the informal decision and requested an adjudicatory hearing before the Department. After due notice, an adjudicatory hearing was held

The Division found that the Respondent did not violate the Dig-Safe Law with respect to the June 10, 1991 incident at Washington and Cobden Streets.

on June 1, 1994, pursuant to 220 C.M.R. §§ 99.00 et seq.

The Division presented one witness, Thomas Lennon, of Boston Edison. The Division offered the following exhibits as evidence: the damage report for the incident at Chilcott and Washington Streets, on May 30, 1991, 2:00 p.m. (Exh. Div. 1); the damage report for the incident at Chilcott and Washington Streets, on May 30, 1991, 9:30 a.m. (Exh. Div. 2); the damage report for the incident at Atherton Place and Columbus Avenue, on June 7, 1991 (Exh. Div. 3); the damage report for the incident at Washington and Cobden Streets, on June 10, 1991 (Exh. Div. 4);² the NOPV (Exh. Div. 5); the informal decision (Exh. Div. 6); the Respondent's letter requesting an adjudicatory hearing (Exh. Div. 7); and a map of the excavation sites (Exh. Div. 8). The Respondent sponsored two witnesses, Thomas Tamborini, human resources manager, and Joseph Zenga, foreman, for the Respondent. The Respondent offered the following exhibits: a letter from Boston Edison to the Department, dated June 3, 1991, with a fax cover sheet from the Department to Thomas Tamborini (Exh. R. 1); transcript of the deposition of Patrick Gillooly, dated November 23, 1993 (Exh. R. 2); personal injury report (Exh. R. 3); a photocopy of four photographs of the site (Exh. R. 4); statement of Douglas Bonner (Exh. R. 5); affidavit of Paul DesRoche (Exh. R. 6); and affidavit of Henry Saboo (Exh. R. 7). The Department moved all exhibits into evidence.

The Division offered the report of the June 10, 1991 incident only because the incident was referenced in the NOPV. The Respondent's conduct is not at issue in this proceeding with respect to the June 10, 1991 incident.

II. <u>SUMMARY OF FACTS</u>

A. The Division

This case arises out of three separate incidents in which the Division alleges that the Respondent, on each occasion, violated the Dig-Safe Law by failing to exercise reasonable precautions. The incidents in dispute occurred at: (1) Chilcott and Washington Streets, West Roxbury, on May 30, 1991 at 9:30 a.m.; (2) Chilcott and Washington Streets, West Roxbury, on May 30, 1991 at 2:00 p.m.; and (3) Atherton Place at Columbus Avenue, West Roxbury, on June 7, 1991.

On May 30, 1991, at approximately 9:30 a.m., the Respondent performed excavations at Chilcott and Washington Streets, West Roxbury, in close proximity to a Boston Edison manhole (Exhs. Div. 2, Div. 6; Tr. at 6-7). In performing the excavations, the Respondent damaged a Boston Edison duct and a Boston Edison line (Exh. Div. 2). The Division's witness, Mr. Lennon, testified that the site was properly marked and an inspector was assigned to the area to remark the facilities and assist the Company in locating the utilities (Tr. at 7, 8, 11, 12). Although Mr. Lennon was not present at the scene at the time the damage occurred, he indicated that the Respondent used a backhoe in performing the work (id. at 10, 40). Mr. Lennon contended that the Respondent could have avoided the damage by using a shovel instead of a backhoe (id. at 40).

The Division asserted that at approximately 2:00 p.m. the same day, the Respondent also damaged a Boston Edison line (Exh. Div 1). Mr. Lennon testified that the incident occurred in the same trench involved in the 9:30 a.m. incident (Tr. at 6). He claimed that after the 9:30 a.m.

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incident, the trench had been declared unsafe and the Respondent had been instructed to discontinue the excavations (<u>id.</u> at 7, 10, 28).

Mr. Lennon presumed that the Respondent entered the trench to investigate a backed-up sewer drain (id. at 33).³ He stated that the bottom of the trench contained an old Boston Edison clay duct which was seeping water and some debris. (id. at 9). Mr. Lennon conceded that the appearance of duct bank was consistent with clay ducts used in some old drainage systems (id. at 14, 32). Mr. Lennon testified, however, that in his opinion, the duct bank could not be confused with a drainage system because of its proximity to the Boston Edison systems (id. at 33-34). He stated that the Respondent inserted a digging bar through the duct striking a cable, which then flashed injuring two people (id. at 8). Mr. Lennon contended that the Respondent acted unreasonably by going into a trench with a digging bar (id. at 30, 39-40). He also asserted that the incident could have been avoided had the Respondent inquired about the nature of the leak and the duct (id. at 11, 40).

The Division also contended that on June 7, 1991 at the intersection of Atherton Place and Columbus Avenue, West Roxbury, the Respondent damaged a Boston Edison duct and line, and a three-phase primary main, also by failing to exercise reasonable precautions (<u>id</u>. at 4; Exhs. Div. 3, Div. 6). Mr. Lennon testified that the area was properly marked but could not recall the exact width of the markings (Tr. at 13, 27, 38). He further testified that the Respondent performed the excavations using a backhoe approximately six to eight feet from a manhole (<u>id</u>. at 13, 20). Mr. Lennon indicated that the damage could have been averted had the Respondent exercised

Mr. Lennon admitted that he was not present at the scene at the time the incident occurred (<u>id.</u> at 22). He testified that he arrived later that afternoon, just after the incident (<u>id.</u>).

reasonable precautions (id. at 41-42).

B. <u>The Respondent</u>

The Respondent contended that it exercised reasonable care in performing all of the excavations in question (<u>id.</u> at 78). The Respondent's witness, Mr. Tamborini, testified that on May 30, 1991, the Respondent excavated the Chilcott and Washington Street area initially using a backhoe to remove the asphalt and some of the subsurface (<u>id.</u> at 51). Mr. Tamborini further testified that the Respondent then dug by hand and uncovered all of the utilities noted on the street and in drawings furnished by the Boston Water and Sewer Commission ("BWSC") (<u>id.</u>). He stated that the Respondent then resumed excavations using the backhoe (<u>id.</u>). Mr. Tamborini testified that at that time, the backhoe encountered an unprotected buried cable (<u>id.</u>). The affidavit of Henry Saboo, job foreman for the Respondent, also indicated that the all of the utilities depicted on the drawings had been exposed when the backhoe struck the cable (Exh. 7, at 3).

The Respondent's witness, Mr. Zenga, corroborated Mr. Tamborini's testimony as to the incident occurring on May 30, 1991 at 9:30 a.m. Mr. Zenga stated that after the asphalt had been removed, the Respondent, in accordance with its practice, excavated approximately six to twelve inches by hand before using the backhoe (id. at 59). He noted that approximately 90 percent of the excavations had been performed by hand (id. at 60). Mr. Zenga also noted that the foreman who performed the excavations for the Respondent has a considerable amount of experience and

has a reputation for being extremely cautious (<u>id.</u>). Therefore, the Respondent contended that it exercised reasonable precautions because it had exposed all of the marked utilities before encountering the line and the line was unprotected giving the Respondent no warning of its existence (id. at 53-54).

With respect to the 2:00 p.m. incident, Mr. Tamborini indicated that the Respondent was searching for a sewer service which was causing a back-up in an area restaurant (<u>id.</u> at 53, 58). He stated that prior to the incident, the Boston Edison repair crew informed the workers that all of the lines in the area were dead (Tr. at 52; Exh. 6, at 2-3; Exh. 7, at 3). Contrary to Mr. Lennon's testimony, Mr. Zenga also testified that he heard Bill Richards, a supervisor at Boston Edison, specifically tell the workers that it was safe to go into the trench (Tr. at 56, 62, 70-71; Exh. 6, at 2-3). Mr. Tamborini testified that in the course of the excavation, the Respondent located a clay duct in the ground seeping dirty water (Tr. at 53). The Respondent's crew believed it had located the sewer service (<u>id.</u> at 53, 74; Exh. 6, at 3; Exh. 7, at 4). As a result, Kevin Whittaker, an excavator at the scene, tapped the pipe with an iron bar in an attempt to alleviate the sewerage obstruction (Tr. at 53; Exh. 6, at 5; Exh. 7, at 4). The cable, however, flashed causing an explosion (Exh. 6, at 5; Exh. 7, at 4).

In regard to the incident occurring on June 7, 1991, both Mr. Tamborini and Mr. Zenga were present at the Atherton Place and Columbus Avenue site (<u>id.</u> a 54, 67). The project consisted of installing drain lines at a depth of approximately eight feet (<u>id.</u> at 75). In performing the excavations, Mr. Zenga indicated that the Respondent used both hand tools and a large backhoe (<u>id.</u> at 75). The Respondent first uncovered an electric utility at a depth of

approximately three feet (<u>id.</u> at 55). At a depth of approximately eight feet, the Respondent encountered and damaged a Boston Edison duct bank while operating the backhoe (<u>id.</u> at 54, 55, 75). The Respondent contended that the incident resulted from improper markings, not due to a lack of reasonable precautions (id. at 55).

In support, both witnesses testified that the markings did not indicate the width of the utility, nor was there any indication of the presence of a duct system (<u>id.</u> at 55, 65). Thus, the Respondent expected to find only one utility (<u>id.</u> at 56, 75). In addition, Mr. Zenga testified that on that particular day, Mr. Hurley, the Boston Edison representative, was not available for consultation (<u>id.</u> at 67). The Respondent argued that its position is further supported by the fact that the excavators uncovered the utility depicted in the marks without incident (<u>id.</u> at 56).

III. STANDARD OF REVIEW

G.L. c. 82, § 40, states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes failure to exercise reasonable precautions.

See Cairns and Sons, Inc. v. Bay State Gas Company, D.P.U. 89-DS-15 (1990); Petricca

Construction Company v. Berkshire Gas Company, D.P.U. 88-DS-31 (1990); John Mahoney

Construction Company v. Boston Gas Company, D.P.U. 88-DS-45 (1990); Northern Foundations, Inc. v. Berkshire Gas Company, D.P.U. 87-DS-54 (1990). However, in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp. v. Commonwealth Electric Company, D.P.U. 91-DS-2 (1992).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, D.P.U. 89-DS-116, at 9 (1993); Fed.

Corp., supra, at 5-6. In addition, the mere fact that a facility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas Company, 1 Mass.

App.Ct. 62 (1973). In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro and Sons, D.P.U. 91-DS-4 (1992); Fed. Corp., supra; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

IV. ANALYSIS AND FINDINGS

The first issue in this matter is whether the Respondent violated the Dig-Safe Law by failing to exercise reasonable precautions in performing excavations at Chilcott and Washington Streets, on May 30, 1991 at 9:30 a.m. The Division argues that the damage could have been avoided had the Respondent used a shovel rather than a backhoe. We do not agree with the

Division. The Respondent's use of a backhoe was reasonable given the fact that the Respondent had uncovered all of the utilities marked on the street and noted on BWSC drawing. See Umbro and Sons, supra at 7 (use of backhoe found reasonable where excavator identified utilities from markings and blueprints, and dug by hand to uncover and expose known utilities). Moreover, the fact that the Respondent performed the majority of the excavations by hand also demonstrates the reasonableness of the precautions taken. See id. Accordingly, the Department finds that the Respondent did not violate the Dig-Safe Law in performing this excavation.

The second issue is whether the Respondent violated the Dig-Safe Law by failing to exercise reasonable precautions while attempting to alleviate a sewer back-up at Washington and Chilcott Streets, on May 30, 1991, at 2:00 p.m. In resolving this question, the Department first must determine whether the incident occurred in the course of an excavation. See J.F. White Contracting Co., D.P.U. 91-DS-6 at 10 (1994). Department regulations define "excavation" as:

....the movement or removal of earth, rock, ledge or other materials in the ground to form a cavity, hole, hollow or passage therein. It shall include, but not be limited to, digging; trenching; grading; scooping; tunneling; augering; boring; drilling; pile driving; plowing-in or pulling-in pipe, cable, wire, conduit or other substructure; backfilling; demolition of any structure; arid blasting, except blasting in a quarry....

220 C.M.R. § 99.02. The Department finds that the Respondent was not engaged in excavations at the time the incident occurred. The Respondent had already exposed and located the conduit, and intentionally tapped the clay duct in an attempt to alleviate a backed-up sewer line. The Respondent was not in the process of digging or performing any other act described in 220 C.M.R. § 99.02. Therefore, the Department finds that the Respondent's conduct does not fall within Dig-Safe Law. Accordingly, the Department finds no violation of the

Dig-Safe Law.

The final issue is whether the Respondent failed to exercise reasonable precautions in performing excavations on June 7, 1991 at Atherton Place and Columbus Avenue. In order to find a violation, the Division must present sufficient evidence and illustrate alternative measures the Respondent could have taken to avoid the damage. New England Excavating, supra, at 9; Fed. Corp., supra, at 5-6; Umbro and Sons, supra; Albanese Brothers, Inc., supra. In the instant case, the Division failed to meet its burden.⁴ The Division presented no evidence as to action the excavator could or should have taken. The Division's witness merely testified that Respondent should have proceeded with caution. Moreover, the Respondent presented sufficient evidence indicating that reasonable precautions were taken under the circumstances. Both of the Respondent's witnesses were present at the site, and both testified that the markings did not depict the duct system that was damaged. The Respondent had already located and uncovered a conduit by digging by hand. Therefore, the Respondent reasonably believed that the backhoe could be safely used at the time the damage occurred. See <u>Umbro and Sons</u>, supra at 7 (use of backhoe found reasonable because conditions could not reasonably be anticipated). Accordingly, the Department finds that the Division failed to demonstrate that the Respondent violated the Dig-Safe Law on June 7, 1991, by failing to exercise reasonable precautions.

V. ORDER

Accordingly after due notice, hearing, and consideration, it is

The Supreme Judicial Court may set aside a decision as prejudiced for further action when that decision is "(e) Unsupported by substantial evidence." G.L. c. 30A, § 14(7). Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6).

ORDERED: That the notice of probable violation issued by the Division of Pipeline Engineering and Safety against Methuen Construction Company shall be and is hereby dismissed.

By Order of the Department,
Kenneth Gordon, Chairman
Barbara Kates-Garnick, Commissioner
Mary Clark Webster, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).